Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: December 4, 1997
CASE NO: 96-INA-374

In the Matter of:

LOCAL 210 HEALTH & INSURANCE FUND
Employer

On Behalf of:

VIOLETA PENCIU CULCEA
Alien

Appearance: Edward J. Mitchell, Esquire
Long Island City, NY
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On June 20, 1994, Local 210 Health & Insurance Fund ("employer") filed an application for labor certification to enable Violeta Penciu Culcea ("alien") to fill the position of Bookkeeper at a weekly wage of $490.00 (AF 14). The job duties are described as follows:

> Handle cash receipts, cash disbursements, general ledger for Health & Insurance Pension, Scholarship and Legal fun; maintan [sic] the monthly schedules of Accounts Payable and Receivable for 4 funds; make daily deposits for Health & Insurance Pension, Scholarship and Legal funds, bank reconciliation statements as well as maintain proper lines of communication with the banks; prepare weekly payroll handwritten pay sheets including Local, State and Federal payroll tax for 20 employees; transfer money to MAXON Co. For verification and payment to Health & Insurance claims; verification of amounts received and relationship with bookkeepers from our companies (approx. 150) which we represent for all funds. Transfer money in our investment accounts from PRUDENTIAL when [it] is necessary.

The job requirements are a high school diploma with two years of experience in the job offered. Other special requirements were stated as "ability to handle all the duties described in item 13 without the help of computers" (AF 14).

On January 22, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of § 656.21 (b) (6) which provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons. The CO determined that the employer failed to provide lawful job-related reasons for the rejection of 20 of the 31 applicants (AF 135). The CO underscored that several applicants, responding to questionnaires from the state employment office, indicated that they were never contacted by the employer.

In rebuttal, dated February 21, 1996, the employer addressed each of the 20 applicants explaining why each was rejected. The employer stated that it rejected Applicant Galicki because she did not have adequate communication skills; Applicant Carter because he excluded himself

[1] All further references to documents contained in the Appeal File will be noted as "AF."

from consideration by indicating that the offered salary was insufficient; Applicants Meersand, Tabacco, Villanueva, and Volfson because they failed to appear at scheduled interviews; Applicants Tarbell and Manolias because they secured other employment; and, Applicants Hines, Santini, Bailey and Deutchman because they lacked the skills necessary to perform the job. The employer indicated that the remaining eight applicants were rejected because they lacked proficiency in English.

The CO issued the Final Determination on March 12, 1996 denying certification. The CO accepted the employer's rejection of 14 of the applicants, but continued to dispute the rejection of Applicants Meersand, Tabacco, Villanueva, Volfson, Tarbell and Manolias (AF 143). The CO explained that the employer claimed to have contacted all six of these applicants by phone. However, in responding to questionnaires circulated by the state employment agency, all six of these applicants indicated that the employer never contacted them to arrange for an interview.

On March 12, 1996, the employer requested administrative review of Denial of Labor Certification (AF 1).

Discussion

The issue presented by this appeal is whether the employer provided lawful, job-related reasons for rejecting Applicants Meersand, Tabacco, Villanueva, Volfson, Tarbell and Manolias pursuant to § 656.21 (b) (6) of the regulations.

Generally, an employer must show that U.S. applicants are rejected solely for lawful job-related reasons. § 656.21 (b) (6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. § 656.20 (c) (8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. § 656.2 (b).

The Board has consistently held that an employer must document its reasonable efforts to contact qualified U.S. workers. *Churchill CabinetCo.*, 87-INA-539 (Feb. 17, 1988); *William W. Wright Stables*, 87-INA-502 (Jan. 6, 1988). In this case, the employer stated that it contacted Applicants Meersand, Tabacco, Villanueva, and Volfson by telephone to set up interviews with each of these applicants. The employer attempted to verify these phone calls with the phone company but was informed that local phone calls lasting less than three minutes are not registered in their system.[2] The employer also alleged that Applicants Tarbell and Manolias were contacted by phone. The employer maintained, however, that both of these applicants informed the employer that they had recently obtained other employment and thus were no longer interested in the bookkeeping position.

[2] The employer submitted a one-sentence statement from a NYNEX representative attesting to this fact (AF 138).

In responding to follow-up letters from the state employment office, all six of these applicants stated that they were not contacted by the employer (AF 108, 104, 92, 72, 60, 53). As a result, the CO denied certification finding that the independent statements from these six applicants were probative in demonstrating that the employer failed to contact these applicants. Under these circumstances, we find that the CO's conclusion was reasonable and therefore hold certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.